IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

10

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the appellant, by his attorneys, and respectfully shows unto the court:

That on April 1, 1940, this court, acting through Circuit Judges Garrecht, Haney and Stephens, handed down an opinion in the above cause, affirming a judgment of the United States District Court for the District of Arizona, in which the appellant says the court erred, and now moves the court to grant a rehearing of this cause, and if possible a reargument, to the end that the issues may be cleared, and as grounds therefor respectfully shows:

Principal Ground: The court's holding that the transaction relied on for recovery did not create a lien upon the land in question, but only the right to collect the balance due on the executory contract of sale, is based upon misapprehension as to the real derivation of the lien asserted as to plaintiff's theory of recovery, and as to the true nature of the cause of action, and more particularly:

(1) The lien asserted is derived, not from the executory contract of sale, but from an assignment of all right, title and interest by the holder of the legal title to the land.

(2) Mississippi Valley Life Insurance Company, vendor in the executory contract, and holder of legal title to the land, could and did create a lien on the land, subject of course to the Wallace equity.

(3) This is not a suit to foreclose the equity of the vendees; it is a suit to establish a lien on the vendor's interest in the land, and to sell that interest, subject of course to the Wallace equity, to satisfy the claims of holders of registered policies.

Certificate of Counsel: The subscribing attorneys for the appellant hereby certify that this petition for rehearing is presented in good faith, in the belief that it possesses merit, and not for any purpose of delay.

That Silverthorne & Silverthorne, whose post-office address is Phoenix National Bank Building in Phoenix, Arizona, are attorneys for the appellees, Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty, and three copies hereof are being mailed to them in the same mail carrying these.

Appellant submits herewith his brief and argument to sustain the above grounds for rehearing, and asks the court, in view of the above, to grant him the privilege of argument hereon.

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BRIEF AND ARGUMENT IN SUPPORT OF THE MOTION FOR REHEARING.

Unfortunately, this simple case has become confused. The counsel here petitioning are by no means free from fault. But in a case involving such strong equities, we trust that the court need not visit punishment for the derelictions of counsel upon the policyholders represented. We crave the court's indulgence for a deferential effort so to dispel the confusion as to lead to a different result than that heretofore announced.

While we have particularized three points of confusion, as we see it, this argument will be so brief that we feel it unnecessary to discuss them separately.

This court has been at pains to determine and state the legal relation that resulted from the executory contract between Two Republics Life, as vendor, and the Wallaces, as vendees, of the land in question. It is held that this executory contract did not pass a title to the vendees, the Wallaces; and that the legal title continued to reside in the vendor, Two Republics Life.

That is and has been our own view of the resulting relation. In fact, it is the fundamental point in our theory. Two Republics and its successors, Mississippi Valley Life, owned this land, in legal title. So owning the land, they could put a lien on it. And that is what we contend they did.

This court misconceives our position and theory in attributing to us (Op. p. 7) a contention that the contract between Two Republics and the Wallaces constituted an equitable mortgage. It is the assignment of the vendor's interest in that contract and in the land itself, that constitutes the equitable mortgage.

Why do we inquire into the relation that subsists between the vendor and the vendee in an executory contract to sell realty? Simply to ascertain what interest adheres to the vendor. For it is the vendor's interest that was assigned to us. We can claim nothing under the vendees. They never assigned to us. And of course when the vendor assigned to us, we took subject to any rights and interests the vendees had.

If this be clear, it follows that we are in accord with the court's statement that "the grantee (here the Wallaces, vendees) had no interest in the realty to which a lien in favor of the grantor (here Mississippi Valley Life, the vendor) could attach." Certainly, as the court also says, "appellant's predecessor did not succeed to a lien."

But, again, our lien does not derive from the Wallaces. It derives from Mississippi Valley Life, which corporation, as we understand the opinion and as we earnestly contend, held the legal title. Surely the legal owner could put a lien upon the land.

We now deferentially direct attention to this passage (Op. p. 8):

> "There being no lien on the land it is apparent that upon assignment of the contract by the

> vendor (Two Republics) to the New Mexico superintendent of insurance, the latter obtained none, but only 'the right to collect the balance due thereon.' "

Is not this a *non sequitur?* Is it not inconsistent with the court's basic holding?

True, the Two Republics did not "succeed to" and did not have a lien on the land. But it had something vastly better. It had the legal title. True, the Two Republics did not and could not *make over* to the superintendent of insurance a lien it did not have. But it could do and did something simpler yet. It *created* a lien in favor of the superintendent on the legal title it did have.

And the lien in favor of the superintendent of insurance created by the Mississippi Valley Life's assignment (Ex. J) was in the nature of an equitable mortgage. Mississippi Valley Life owned the land in legal title. It *sold, assigned* and *transferred* all its *right, title and interest in and to* the Wallace security. Its right, title and interest in the Wallace security was legal title to the land. True, that embraced the right to collect the balance on the contract. But it included more. It included continued legal ownership until final payment made. Under the escrow arrangement, it included the right to demand and have the already executed and deposited quitclaim, in case the Wallaces should default. It included everything except the possessory right of the Wallaces so long as they continued to pay, and the equity of the Wallaces to a specific performance.

The Mississippi Valley Life, having transferred to the superintendent "all" of its right, title and interest, how can it be said that the superintendent got only a part of it, the right to collect accruing payments?

Now this assignment, though covering the entire title and interest of the Mississippi Valley Life, was not an absolute transfer. It was made for the purposes of security. The assignment recites the conditions. It was an intended compliance with state requirements as to registered policies. It was to remain effective while the security (the Wallace contract) remained on deposit. The security assigned was to be used "for the purpose of fully protecting any and all holders of policies so registered." The superintendent was "to have and to hold said security for the purpose of satisfying just claims of any policyholder in case of possible default of said first party in the matter of satisfying the same." We cannot see how this transaction can be anything less or other than an equitable mortgage on the land.

The Mississippi Valley Life reserved nothing from this pledge of its property. The "security" still remains on deposit. It is needed for the protection of the holders of registered policies. There has been default by the pledgor. The intention is plain that in case of default the superintendent of insurance should stand in the shoes and have every right of the pledgor. And that is all we ask. The pledge, it seems to us, must go to the land itself. It is quite immaterial that, by keeping up and completing the payments, the Wallaces could or might get the legal title. That did not

prevent the owner from pledging what he had; it does not prevent us from enforcing the pledge for what it may be worth. The pledge is all embracing. Our lien is as broad as the pledgor's title. It remains attached to the land until the Wallaces or their assigns qualify to take the title.

Such is our theory of the lien and of the cause of action. It does not touch and is not concerned with the interest of the vendees in the contract or their equity in the land. We can see nothing to prevent a sale of this land under foreclosure decree, subject to equities of the vendees. If defendant, Republic Life of Dallas, had not intruded, it would have been simple enough. Its intrusion seems to have brought confusion.

It happens that defendant, Republic Life of Dallas, came into the picture, through its man Banta, in two capacities. First, through the proceedings set forth in the complaint, it secured a quitclaim from Pelsue, the Arizona receiver of the Mississippi Valley Life. That carried the vendor's interest in the contract and the land. That interest, for reasons stated in the complaint, it acquired subject to our lien. Second, at practically the same time Republic Life of Dallas also acquired the vendees' interest in the contract and its equity in the land. At least it attempted to do so through a warranty deed from Mrs. Rowell, the surviving Wallace.

This transfer of the Wallace interest to Republic Life of Dallas did not change our situation in the slightest. It was open to anyone to acquire that interest. Whoever acquired it would have the payments to make,

or would eventually be defaulted and forfeited or foreclosed out. If we ever had a lien on the vendor's interest and a right to foreclose it, as seems unescapable, those rights could not be affected by a change of ownership of the vendees' interests.

But the dual interests and capacities of defendant Republic Life of Dallas, aids confusion. Counsel have persistently contended as if this were a suit to foreclose and sell the Wallace interest for default in payments. It is not. No default on the part of the vendees is alleged in the complaint. It is not shown what payments they may have made or how much they may still owe. This suit goes to the vendor's interest, and goes to the defendants in their capacity as claimants of that interest. To sell that interest would not touch or affect the interests or rights of these same defendants as successors to the Wallaces, any more than their acquirement of the Wallace interests affected our lien on the vendor's interest. It would simply cut off their claim of legal title to the land as successor of Mississippi Valley Life.

Our complaint has perhaps aided the confusion. It is not a model of clarity and precision. It may not run always true to the theory here stated. In zeal to give the court the whole picture, we may have alleged surplusage. The prayer might have been more plainly limited as going only to the vendor's interest. But none of that is of the substance. The complaint has not been attacked on such grounds. It is challenged as not stating a cause of action. We submit that it does.

It lacks nothing, we believe, of a cause of action to foreclose a lien in the nature of an equitable mortgage created by the owner of the land. We claim no interest on the vendees' interest in the contract, and do not seek to foreclose as against that interest.

In closing, may we say that if the court should come to agree with our position as here stated, there would still be no necessity of interpreting the New Mexico statute (L., 1909, N. M., Ch. 48, Sec. 38). Regardless of its meaning and scope, we have here a lien by contract, under the authorities cited in our brief, filed pursuant to the court's direction, particularly *State v. Am. Bonding & Cas. Co.*, 206 Ia. 988, 221 N. W. 585; *In re New Jersey Fid. & Plate Glass Ins. Co.*, 15 N. J. M. 384, 191 Atl. 475.

Respectfully submitted,

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